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IN THE

Supreme Court of the United States

October Term, 1966

No. 646

INDIANA & MICHIGAN ELECTRIC COMPANY,
Petitioner,

against

FEDERAL POWER COMMISSION,
Respondent.

PETITIONER'S REPLY TO BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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The Brief in Opposition (pp. 4-5) claims that the Commission "expressly found" on the basis of Staff-sponsored "flow studies, that out-of-state energy was in fact received by all of petitioner's wholesale customers." As to Petitioner's Indiana customers, however, no such finding was made because any such finding was impossible on the record. As the Commission said in its opinion:

> "The network of generators and high voltage transmission lines extending over seven states is only the visible evidence of the pool in which currents changing from minute to minute can be measured but where often *there is no way to determine,* or need to determine, *the way the needs of each power customer will be supplied.*" (R. 16545, emphasis added.)

Finding No. 2 of the Commission's decision expressly grounded the assertion of Federal sales jurisdiction on Petitioner's status as a member of the American Electric Power System, and not on any conclusion as to the flow of electric energy (R. 16551).* The basis of this finding is directly contrary to Section 201(c) of the Federal Power Act** and directly in conflict with the cases† construing that Act.

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*"(2) IM is a member of the power pool composed of several companies further organized into the AEP system and such pool is an integrated and coordinated interstate electric system, and the sales of system energy, such as those by IM to the 24 municipals and co-operatives referred to in (3) below, are pool sales, and hence, in the light of the interstate nature of the pool are sales in the interstate commerce."

**"* * * electric energy shall be held to be transmitted in interstate commerce if transmitted from a State and consumed at any point outside thereof * * *."

† Contrary to the claim at pages 6 and 7 of the Brief in Opposition, no case decided prior to the Commission's decision below embraces, endorses or supports the test the Commission now urges, as the Commission itself recognized in its decision:

> "* * * In every previous case sales for resale from integrated, interstate pools have been found jurisdictional, and *in each case, this finding has been supported by evidence purporting to trace out-of-State energy to each of the sales involved* or facts from which such a conclusion could be reasonably inferred." (R. 16540, emphasis added.)

Such support was present in *Penn Water*, where the evidence showed (see FPC Brief to this Court, p. 108, n. 71) and this Court took note (343 U. S. at 420) that the wholesale customers in Pennsylvania received energy generated wholly in Maryland for substantial periods of time. In the *Public Utilities Commission of California* case, there was no question that the power sold to wholesale customers in Nevada had been generated entirely in California (345 U. S. at 297). In *Wisconsin-Michigan*, the company conceded that energy generated out of state was sold to its wholesale customers in both Wisconsin and Michigan (10 F. P. C. at 174-75). Similarly, in the *State of Wisconsin* case, "the company affirmatively stated that the power then being sold to the municipalities [in Wisconsin] was coming in part from Illinois * * *" (210 F. 2d at 187).

As this Court most recently explained the proper jurisdictional test:

> "We said * * * 'Federal jurisdiction was to follow the flow of electric energy, an engineering and scientific * * * test.' And that is the test we have followed under * * * the Federal Power Act. * * *" *California* v. *LoVaca Gathering Co.*, 379 U. S. 366, 369 (1965).

The so-called Staff "flow studies" were not studies of the flow of electric energy at all. Instead, they consisted of testimony (a) identifying receipts of out-of-state energy at the state line and (b) assuming that some of this energy reached every point on Petitioner's electric system without any further analysis of meter readings and without any analysis of the electric facilities intervening between the point of out-of-state receipt and the point of sale (R. 1092, 1782-1783).

This testimony concededly involved concepts rather than facts (R. 2111). To its sponsoring witness, it did not afford an adequate or independent basis for determining the physical realities of energy flow, but only a rough method used to check some of the ideas he had earlier advanced about integrated electric systems (R. 1706-14, 2059). The witness conceded that his approach has not been accepted by anyone (R. 2143), that it is not scientific* (R. 1829), and that it ignores the physical dimensions of the electric conductors involved and the arrangement of the

* Far from seeking "internal Commission memoranda" (Brief in Opp., p. 9), Petitioner in its discovery motions sought engineering studies and other written applications of a proper scientific approach to this problem known to be in the possession of the Commission or its Staff for the purpose of demonstrating that a truly scientific approach to this case by the Commission's own experts would have produced and previously had produced a conclusion that these sales are in intrastate commerce.

intervening circuity (R. 1825-26), even though such dimensions and such arrangement could definitely affect the results of a careful effort to establish the flow of electric energy (R. 1829):

The receipts at the state line of out-of state energy identified at R. 1082-1093 all relate to certain hours when (1) except for the city of Richmond, there is no showing in the record that any customer in issue was actually receiving energy, and (2) it is undisputed that Petitioner's Indiana generation exceeded the maximum combined demands of all the customers in issue (R. 1271-84, 3032-36). These hourly readings were specifically appraised by FPC's sole engineering witness as follows: "The data, such as it is, do not even suggest or tell what happened[*] during the hour for which the data were used." (R. 1785)

In this case the Commission has no substantial scientific or engineering evidence as to the flow of electric energy. It has instead relied on its presumed expertise and on its previous victories on appeal of sales jurisdiction cases. This presumption and these victories, however, do not relieve the Commission of its continuing obligation to rely on substantial evidence when it determines to oust a State Commission (Indiana) of jurisdiction over local sales which it has regulated for more than 40 years.

In *Rochester Gas & Elec. Corp.* v. *FPC*, 344 F. 2d 594 (2d Cir. 1965), the Commission had denied a company's application for a declaratory order that certain hydro-

* This is the type of data to which the following statement from the Brief in Opposition (p. 9) refers:

"Petitioner had in its possession the essential factual data about its operations without which the proceeding could not have been conducted."

electric projects did not require licensing, because in the exercise of its expertise it had decided that those projects were on navigable waters.

The Court, with all due allowance for the Commission's expertise, could not find that the Commission's conclusions were supported by substantial evidence and reversed, saying:

> "The Commission notes that none of its previous findings of navigability have ever been set aside by the courts. We congratulate the Commission on its achievement, which is undoubtedly attributable to the full factual foundation on which its findings have heretofore been based. This successful performance, however, does not relieve the Commission of the continuing obligation to rely on evidence that is substantial when it determines that a river is navigable." (344 F. 2d at 596)

In the absence of any such "full factual foundation" for the Commission's determination of jurisdiction here, the Court below should have reversed in accordance with the dissenting opinion.

Conclusion

For the reasons stated therein the petition for a writ of certiorari should be granted.

Respectfully submitted,

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